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COUNSEL

May 3, 2002

The Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Delay of Auctions Nos. 31 and 44,
WT Docket No. 99-168, GN Docket No. 01-74

Dear Chairman Powell:

PGTV, Inc.'s Total.TV service ("Total.TV"), by its attorneys, responds to the April 18, 2002, letter submitted by the Spectrum Clearance Alliance ("Alliance") opposing Total.TV's request that the Commission reconsider the timing and structure of its planned auctions of licenses for the Upper and Lower 700 MHz spectrum (Auction Nos. 31 and 44).

As most recently reflected in a letter from Commerce Secretary Evans to FCC Chairman Powell, it will not serve the public interest to go forward with the 700 MHz auctions as presently configured, given the uncertainties that exist about how licensees will be able to operate under the current service rules and in the current interference environment in the band.¹ Total.TV has taken a similar position, but has not called for a lengthy delay in the auctions. Total.TV simply has requested that certain changes be made in the auction rules and the services rules for the 700 MHz spectrum. Total.TV's proposed changes will make Auction Nos. 31 and 44 technology and service neutral and

¹ Letter from Donald Evans, Secretary of Commerce, to Michael K. Powell, Chairman, Federal Communications Commission (April 18, 2002).

will permit the introduction of a new, competitive MVPD service, which itself will hasten the transition to digital television.

The Commission need not concern itself with the Alliance's unwarranted attacks on Total.TV's business plan. The Alliance does, however, raise one objection that is worthy of a response, which is that Total.TV's proposal injects too much delay into a process that already has suffered delay. To the contrary, the modest changes in course suggested by Total.TV could be implemented by the Commission in relatively short order and without significant delay in the auction. Further, because the technology that has been developed could co-exist with existing analog television broadcasting, this would greatly reduce the need for band clearing and the cloud of uncertainty that this puts over the auction.

Despite the Alliance's objections, there is clear precedent for the Commission to make a mid-course correction in its licensing rules in response to new facts or changed circumstances. Thus, the Commission had, after a lengthy notice and comment rulemaking proceeding, originally established rules to award cellular licenses by comparative hearing. The Commission accepted applications (which included extensive hearing case materials prepared at not inconsiderable expense to the applicants) for the first 90 markets. In so doing the Commission expressly rejected calls for cellular licenses to be awarded by lottery.

Then, however, in response to the lessons learned through the hearing process in the top-30 markets and the pleas of some of the applicants, albeit opposed by others, the Commission elected to change course and awarded the remaining cellular licenses by lottery.² Few who witnessed the licensing process for the top-30 markets would doubt the wisdom of that decision or would dispute that in changing course when it did the Commission speeded the delivery of cellular service to the public.

When there is reason to change existing procedures for awarding licenses, neither law nor policy nor common sense dictates that the Commission must continue heading down the wrong path, simply because it has started in that direction. Total.TV's proposal to the Commission comes down to the following: there are serious problems with the way the auction and service rules for the 700 MHz spectrum have been designed that will frustrate effective use of the band by a new competitor in the MVPD marketplace; these problems still can be corrected without undue delay in the

² See Amendment of Cellular Rules to Allow the Selection from Among Mutually Exclusive Competing Cellular Applications Using Random Selection or Lotteries Instead of Comparative Hearings, 98 FCC 2d 175 (1984).

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auction; the Commission can and should move expeditiously to do so.

Respectfully submitted,

A handwritten signature in black ink that reads "Henry Goldberg". The signature is written in a cursive, flowing style with a large, prominent "H" and "G".

Henry Goldberg
Attorney for PGTV, Inc.

cc: John R. Feore, Jr